

STATE OF MICHIGAN  
COURT OF APPEALS

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STEPHEN J. MINNS,

Plaintiff-Appellant,

v

LEIGH GEOFFREY ROSE,

Defendant-Appellee.

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UNPUBLISHED

August 16, 2005

No. 261436

Oakland Circuit Court

LC No. 2004-060855-CK

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and dismissing this action based on the doctrine of res judicata. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

"As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events. . . ." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The doctrine "bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated." *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001). "For the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies." *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997). "Because res judicata is a question of law, we review de novo its application as well as the court's action on a motion for summary disposition." *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

Plaintiff sued defendant for violation of a joint venture agreement. After that action was dismissed, plaintiff refiled suit. The only issue before us is whether the order of dismissal entered in the prior action operated as an adjudication on the merits. Under the facts of this case, we find that it did not.

The order does not state whether the prior case was dismissed with or without prejudice. The order indicates that the matter came before the court for a court-ordered pretrial conference for which plaintiff and his attorney failed to appear. A court may dismiss an action on a defendant's motion if the plaintiff fails to comply with any court order, including an order to appear for a conference. MCR 2.401(G)(1); MCR 2.504(B)(1). Unless the court states

otherwise, such a dismissal “operates as an adjudication on the merits.” MCR 2.504(B)(3). If that were the reason for dismissal, the second action would clearly be barred.

However, the trial court did not dismiss the prior action for plaintiff’s failure to appear for the conference. Rather, the order states that the action was “dismissed for lack of progress.” Whether or not the prior action could have been validly dismissed for lack of progress, the order was final and cannot be collaterally attacked in this action. *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995); *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987). A dismissal for lack of progress “is without prejudice unless the court specifies otherwise,” MCR 2.502(B)(1), and does not operate as an adjudication on the merits. *Caughey v Rozycki*, 22 Mich App 317, 318; 177 NW2d 257 (1970). Therefore, we hold that the trial court erred by dismissing the instant case on the ground that it was barred by res judicata. *Huggett, supra*.

To the extent *Carter v Southeastern Michigan Transp Auth*, 135 Mich App 261; 351 NW2d 920 (1984), holds otherwise, we find it distinguishable. First, the prior order of dismissal was entered under Fed R Civ P 41(b), which authorizes the court to dismiss for failure to prosecute or failure to comply with a court order, and provides that dismissal constitutes as an adjudication on the merits unless the court states otherwise. Second, the prior order of dismissal stated that the case was dismissed with prejudice. Third, at the time *Carter, supra*, was decided, GCR 1963, 501.3 provided for dismissal for lack of progress but was silent as to the effect of such dismissal. It was not until the adoption of the Michigan Court Rules of 1985 that the court rule specified that such a dismissal was without prejudice unless the court stated otherwise. MCR 2.502(B)(1).

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Donald S. Owens